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PP v. SANDERASEGARAN NITHENANHAM

FEDERAL COURT, MALAYSIA
MOHAMAD ZABIDIN MOHD DIAH CJ (MALAYA)
MARY LIM FCJ
NORDIN HASSAN FCJ
B [CRIMINAL APPEAL NO: 05(L)-68-04-2022(A)]
15 MARCH 2024

Abstract – *A criminal case is proved or otherwise by evidence of witnesses and documents tendered in court, not by what is submitted by the parties or anything said or omitted to be said by a trial judge in his grounds of judgment. The failure of a trial judge to specifically state under which limb of s. 300 of the Penal Code that the accused was found guilty, in the decision at the end of the prosecution case or at the end of the case, does not affect the prosecution's case or cause a miscarriage of justice to the accused. The paramount importance is that the court has considered all the evidence on a maximum evaluation before coming to a determination.*

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CRIMINAL LAW: *Penal Code – Offences – Murder – Offence of murder under s. 302 substituted with offence of culpable homicide not amounting to murder under s. 304(a) of Penal Code – Failure to specify relevant limb under s. 300 of Penal Code to which accused was found guilty – Whether resulted in miscarriage of justice – Whether no specific or express finding under which limb of s. 300 of Penal Code that accused was found guilty affected prosecution's case – Whether non-calling of witness attracted invocation of adverse inference under s. 114(g) of Evidence Act 1950 – Whether defence raised reasonable doubt on prosecution's case*

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CRIMINAL PROCEDURE: *Appeal – Appeal against substitution – Offence of murder under s. 302 substituted with offence of culpable homicide not amounting to murder under s. 304(a) of Penal Code – Failure to specify relevant limb under s. 300 of Penal Code to which accused was found guilty – Whether resulted in miscarriage of justice – Whether no specific or express finding under which limb of s. 300 of Penal Code that accused was found guilty affected prosecution's case – Whether non-calling of witness attracted invocation of adverse inference under s. 114(g) of Evidence Act 1950 – Whether defence raised reasonable doubt on prosecution's case*

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EVIDENCE: *Witness – Non-calling of – Whether witness's evidence material to case – Whether non-production of witness created gaps in prosecution case – Whether attracted invocation of adverse inference under s. 114(g) of Evidence Act 1950*

I

The respondent was charged with the murder of a woman ('deceased') under s. 302 of the Penal Code ('PC'). On 28 February 2016, at about 8pm, SP2 had received an emergency call informing that there was a robbery at a house. Based on this information, SP2 and SP3 proceeded to the house. Upon entering the house, SP3 saw medical officers examining an Indian woman who was lying in the hall and was informed that she was already dead. SP3 saw the respondent standing at the door of a room and when asked by SP3 what had happened, the respondent replied that four Indian men had entered the house and had robbed and hit the deceased before fleeing. The prosecution's main witness was SP6, who lived next door to the house where the incident happened. SP6 testified that on 27 February 2016, at about 7pm, when SP6 and his wife, Peruwati Samiran, reached home from work, SP6 saw the respondent talking to a woman in front of his house. At about 1am, on 28 February 2016, SP6's wife woke him up from his sleep and informed him that she heard the sound of people fighting in the neighbour's house. At the same time, PW6 heard a loud hitting noise, followed by a woman's voice pleading not to be hit. SP6 also heard a male's voice that he recognised as the respondent's. SP6 then peeked into the neighbour's house and saw the respondent walking out through the main door and after looking to his left and right he went back in. After awhile, SP6 heard hitting noises again from the said house and a woman's voice pleading not to be hit. He also heard the respondent's voice saying 'mati … mati ...' ('die … die'). Thereafter, SP6 went back to sleep and when he woke up at about 5.20am, he could still hear the hitting noise and at about 6.15am, he heard a woman's voice breathing heavily and suspected she was dying. The deceased's body was sent to the hospital and a post-mortem was conducted by SP5, who identified the cause of death was head and soft tissue injuries due to blunt object trauma. SP5 concluded that the injuries were caused by a hard and blunt object being repeatedly hit on the deceased, causing excessive bleeding under the head skin and soft tissue, which caused the deceased's death. The prosecution also presented forensic evidence to support its case. The DNA analysis of the exhibits collected from the house and swabbing of blood stains by the chemist, SP11, was found to contain the DNA of the respondent and the deceased only and no one else. The deceased's sister, SP7, also testified that the respondent was the deceased's boyfriend who stayed together with the deceased in the said house for three months before the fateful day. At the High Court, the trial judge found that the prosecution had established a *prima facie* case of murder under s. 302 of the PC against the respondent. Hence, the respondent was called to enter his defence. The trial judge, however, found that the defence of the respondent, that the deceased was hit by robbers, was untenable and had failed to raise a reasonable doubt on the prosecution's case. The respondent was then convicted for the offence of murder and sentenced to death on appeal. The Court of Appeal agreed that there was sufficient evidence to establish the respondent's guilt. However,

A the Court of Appeal believed that the trial judge's failure to specify the relevant limb under s. 300 of the PC, to which the respondent was found guilty, resulted in a miscarriage of justice. Thus, the offence of murder under s. 302 of the PC was substituted with the offence of culpable homicide not amounting to murder under s. 304(a) of the same Code and the respondent
B was sentenced to 20 years imprisonment. Aggrieved, the Public Prosecutor ('appellant') filed an appeal to this court against the said substitution. The issues that arose were (i) whether no specific or express finding by the trial judge under which limb of s. 300 of the PC that the respondent was found guilty affected the prosecution's case in proving the offence of murder under
C s. 302 of the same Code; (ii) whether the non-calling of SP6's wife, Peruwati Samiran, attracted the invocation of adverse inference under s. 114(g) of the Evidence Act 1950; and (iii) whether the defence had raised a reasonable doubt on the prosecution's case.

Held (allowing appeal)

D **Per Nordin Hassan FCJ delivering the judgment of the court:**

(1) There is nothing under ss. 180, 182A or other related provisions of the Criminal Procedure Code that requires the trial judge to state specifically which limb of s. 300 of the Penal Code that the prosecution had proved, in particular before calling the accused to enter his defence.
E Further, the trial judge is also not required to give any reason for calling the accused to enter his defence. Any decision of the court that requires as such, would add something that is not required under the law or put words in a plain and unambiguous provision of the law. The court's duty is to interpret law passed by the Parliament but not to interpret the
F subjective intention of the Parliament. (para 29)

(2) For the prosecution to establish an offence of murder punishable under s. 302 of the PC, the elements to be proved by the prosecution are, the death of the deceased, the deceased died as a result of the injuries suffered, the injuries were caused by the accused, and the accused's act
G comes within one or a combination of the limbs under s. 300 of the PC. The act under any one or combination of the limbs under s. 300 establishes the offence of murder. In the present case, the prosecution, from the beginning of the trial, had made it clear that the prosecution was relying on limb (c) of s. 300. The evidence presented by the
H prosecution had established the element that the respondent had voluntarily caused the injuries which, in the ordinary course of nature, would cause death. This was the element specified under s. 300(c) of the PC. No prejudice was thus occasioned by the absence of the express specification of limb (c) of s. 300. (paras 38-43)

I

(3) A criminal case is proved or otherwise by evidence of witnesses and documents tendered in court, not by what is submitted by parties or anything said or omitted to be said by the trial judge in his grounds of judgment. Otherwise, it would go against the principles of criminal justice and fair trial. The pathologist, SP5, found multiple injuries on the deceased's body, and the fatal blow which had caused her death was on the head. The head injuries which were caused by continuous hitting with blunt objects had caused the deceased's death. Based on the evidence of SP5, the evidence of SP6 who heard the continuous hitting as well as the voice of a woman screaming, and evidence that showed the deceased was already dead when SP3 and SP2 went to the house, it was justified for the trial judge in his finding that the respondent had caused the injuries voluntarily and the injuries on the head were sufficient in the ordinary course of nature to cause death. Even if the trial judge had not specifically stated limb (c) of s. 300 in his grounds of judgment, the evidence presented had proved the element of s. 300(c). The prosecution had disclosed during the trial that the prosecution was relying on the said subsection to prove the elements of the charge against the respondent and the respondent was represented by counsel during the trial. Hence, the issue of miscarriage of justice did not arise simply because the trial judge did not specifically state s. 300(c) in his grounds of judgment. (paras 46-50)

(4) Peruwati had gone back to Indonesia and refused to return to Malaysia to testify in the trial. Be that as it may, what was important was whether her evidence was material to the case. Reverting to the evidence before the court, Peruwati woke her husband, SP6, on that fateful day, informing SP6 that their neighbour was quarrelling. Thereafter, SP6 himself heard the continuous hitting and screaming voice of a woman from the neighbour's house, and saw the respondent exited the main door and returned to the house. Even if Peruwati was called to testify, her version would almost be the same as SP6's evidence. The defence had failed to show that Peruwati's evidence was material and the prosecution had withheld or suppressed this material evidence. Further, the non-production of her as a witness did not create any gap in the prosecution's case. Thus, the non-calling of Peruwati did not warrant an adverse inference under s. 114(g) of the Evidence Act 1950 to be drawn. (paras 60 & 61)

(5) The version that the house was robbed and the deceased was hit by the robbers when the deceased failed to give them the jewellery and money demanded by them was not supported by evidence and was inherently incredible. Evidence showed that the jewellery was still on the deceased body when SP5 conducted the post-mortem and no other valuable items were taken from the house. The room in the house was not even

ransacked. There was also no evidence of any injury on the respondent's body when compared with the deceased who suffered multiple and fatal injuries, although the respondent testified that they were both hit by the robbers. The respondent had also delayed in reporting the incident to the police. There was no reason for SP6 to invent or concoct the evidence against the respondent as there was no animosity between them. There were also no traces of the DNA of any other persons found in the house except that of the respondent and the deceased. There was thus no insufficient judicial appreciation of evidence by the trial judge in finding that the defence had failed to raise a reasonable doubt on the prosecution's case. As such, the decision of the Court of Appeal was set aside and the decision of the High Court in convicting the respondent under s. 302 of the PC was restored. He was sentenced to 35 years of imprisonment and 12 strokes of whipping. (paras 63-66)

Bahasa Melayu *Headnote*

Responden didakwa membunuh seorang wanita ('si mati') bawah s. 302 Kanun Keseksaan ('KK'). Pada 28 Februari 2016, kira-kira jam 8 malam, SP2 telah menerima panggilan kecemasan memaklumkan terdapat rompakan di sebuah rumah. Berdasarkan maklumat ini, SP2 dan SP3 pergi ke rumah tersebut. Apabila memasuki rumah tersebut, SP3 melihat pegawai perubatan memeriksa seorang wanita bangsa India yang terbaring di ruang hadapan rumah dan dimaklumkan bahawa dia sudah mati. SP3 melihat responden berdiri di pintu bilik dan apabila ditanya oleh SP3 apa yang telah berlaku, responden menjawab bahawa empat lelaki India telah merompak rumah tersebut dan memukul si mati sebelum melarikan diri. Saksi utama pihak pendakwaan ialah SP6, yang tinggal bersebelahan dengan rumah tersebut. SP6 memberi keterangan bahawa pada 27 Februari 2016, kira-kira jam 7 malam, apabila SP6 dan isterinya, Peruwati Samiran, tiba di rumah dari tempat kerja, SP6 melihat responden berbual-bual dengan seorang wanita di hadapan rumahnya. Pada pukul 1 pagi, pada 28 Februari 2016, isteri SP6 telah mengejutkan SP6 yang sedang tidur dan memaklumkan bahawa dia terdengar bunyi orang sedang bergaduh di rumah sebelah. Pada masa yang sama, PW6 mendengar bunyi pukulan yang kuat, diikuti oleh suara seorang wanita merayu-rayu untuk tidak dipukul. SP6 juga mendengar suara lelaki dan mengenalinya sebagai suara responden. SP6 kemudian mengintip rumah sebelah dan melihat responden berjalan keluar melalui pintu utama dan selepas melihat ke kiri dan ke kanan, masuk semula ke dalam rumah. Selepas itu, SP6 mendengar bunyi pukulan sekali lagi dari rumah tersebut dan suara seorang wanita merayu-rayu untuk tidak dipukul. Dia juga mendengar suara lelaki yang dikenalinya sebagai suara responden berkata "mati ... mati ...". SP6 kemudiannya kembali tidur dan apabila dia terjaga kira-kira jam 5.20 pagi, dia masih mendengar bunyi dentuman dan kira-kira jam 6.15 pagi, dia terdengar suara seorang wanita yang kesesakan nafas dan mengesyaki dia

sedang nazak. Seterusnya, mayat si mati dihantar ke hospital dan bedah siasat dijalankan SP5, yang mengenal pasti punca kematian adalah kecederaan di kepala dan tisu lembut akibat trauma objek tumpul. SP5 membuat kesimpulan bahawa kecederaan itu disebabkan oleh objek keras dan tumpul dipukul berulang kali pada si mati, menyebabkan pendarahan berlebihan di bawah kulit kepala dan tisu lembut, yang menyebabkan kematian si mati. Pihak pendakwaan juga mengemukakan bukti forensik untuk menyokong kesnya. Analisis ekshibit-ekshibit DNA yang dikumpul daripada rumah dan sapuan kesan darah oleh ahli kimia, SP11, didapati mengandungi DNA responden dan si mati sahaja dan tiada orang lain. Kakak si mati, SP7, turut memberi keterangan bahawa responden adalah teman lelaki si mati yang tinggal bersama-sama si mati di rumah tersebut selama tiga bulan sebelum hari kejadian. Di Mahkamah Tinggi, hakim perbicaraan mendapati pihak pendakwaan telah membuktikan kes pembunuhan *prima facie* bawah s. 302 KK terhadap responden. Oleh itu, responden dipanggil untuk membela diri. Hakim bicara bagaimanapun mendapati pembelaan responden, bahawa si mati dipukul perompak, tidak boleh dipertahankan dan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Justeru, responden disabitkan dengan kesalahan membunuh dan dijatuhi hukuman mati. Mahkamah Rayuan bersetuju bahawa terdapat bukti yang mencukupi untuk membuktikan kesalahan responden. Walau bagaimanapun, Mahkamah Rayuan mendapati bahawa kegagalan hakim bicara menentukan bahagian yang berkaitan bawah s. 300 KK, yang mana responden didapati bersalah, mengakibatkan salah laku keadilan. Oleh itu, kesalahan membunuh bawah s. 302 KK telah digantikan dengan kesalahan pembunuhan bersalah yang tidak terjumlah pembunuhan bawah s. 304(a) Kanun sama dan responden dijatuhi hukuman penjara 20 tahun. Terkilan, Pendakwa Raya ('perayu') memfailkan rayuan kepada mahkamah ini terhadap penggantian tersebut. Isu-isu yang timbul adalah (i) sama ada ketiadaan dapatan khusus atau nyata oleh hakim perbicaraan di bahagian mana bawah s. 300 KK responden didapati bersalah menjejaskan kes pendakwaan dalam membuktikan kesalahan atau pembunuhan bawah s. 302; (ii) sama ada kegagalan memanggil isteri SP6, Peruwati Samiran, menarik dakwaan inferens bertentangan bawah s. 114(g) Akta Keterangan 1950; dan (iii) sama ada pihak pembelaan telah menimbulkan keraguan munasabah terhadap kes pendakwaan.

Diputuskan (membenarkan rayuan)
Oleh Nordin Hassan HMP menyampaikan penghakiman mahkamah:

(1) Tiada apa-apa bawah ss. 180, 182A atau peruntukan lain yang berkaitan bawah Kanun Tatacara Jenayah yang menghendaki hakim bicara menyatakan secara khusus bahagian mana bawah s. 300 KK yang telah dibuktikan oleh pihak pendakwaan, khususnya sebelum memanggil tertuduh membela diri. Selain itu, hakim bicara juga tidak perlu

memberikan apa-apa alasan untuk memanggil tertuduh membela diri. Apa-apa keputusan mahkamah yang memerlukan sedemikian, akan menambah sesuatu yang tidak diperlukan bawah undang-undang atau meletakkan perkataan dalam peruntukan undang-undang yang jelas dan nyata. Tugas mahkamah adalah untuk mentafsir undang-undang yang diluluskan oleh Parlimen, bukan untuk mentafsir niat subjektif Parlimen.

(2) Untuk pihak pendakwaan menetapkan kesalahan membunuh yang boleh dihukum bawah s. 302 KK, elemen yang perlu dibuktikan oleh pihak pendakwaan ialah, kematian si mati, si mati meninggal akibat kecederaan yang dialami, kecederaan disebabkan oleh tertuduh, dan perbuatan tertuduh berada dalam satu atau gabungan mana-mana bahagian bawah s. 300 KK. Perbuatan bawah satu atau mana-mana gabungan bahagian bawah s. 300 akan membuktikan kesalahan membunuh. Dalam kes ini, pihak pendakwaan, dari awal perbicaraan, telah menjelaskan dengan nyata bahawa pihak pendakwaan bergantung pada bahagian (c) bawah s. 300. Keterangan yang dikemukakan oleh pihak pendakwaan telah membuktikan unsur bahawa responden secara sukarela menyebabkan kecederaan yang dalam keadaan lazim semula jadi akan menyebabkan kematian. Ini adalah elemen yang dinyatakan bawah s. 300(c) KK. Oleh itu, tiada prejudis disebabkan oleh ketiadaan spesifikasi nyata bahagian (c) bawah s. 300.

(3) Kes jenayah dibuktikan atau sebaliknya melalui keterangan saksi-saksi dan dokumen-dokumen yang dikemukakan di mahkamah, bukan oleh apa yang dikemukakan oleh pihak-pihak terlibat atau apa-apa yang dinyatakan atau apa-apa yang tidak dinyatakan oleh hakim bicara dalam alasan penghakimannya. Jika sebaliknya, ini akan bertentangan dengan prinsip keadilan jenayah dan perbicaraan yang adil. Pakar patologi, SP5, mendapati terdapat beberapa kecederaan pada mayat si mati, dan pukulan yang menyebabkan kematiannya adalah di bahagian kepala. Kecederaan kepala yang disebabkan oleh pukulan berterusan dengan objek tumpul telah menyebabkan kematian si mati. Berdasarkan keterangan SP5, keterangan SP6 yang mendengar hentakan berterusan serta suara wanita menjerit, dan keterangan menunjukkan si mati sudah pun meninggal dunia ketika SP3 dan SP2 sampai di rumah tersebut, adalah wajar untuk hakim perbicaraan mendapati bahawa responden telah menyebabkan kecederaan secara sukarela dan kecederaan di kepala adalah dalam keadaan lazim semula jadi boleh menyebabkan kematian. Walaupun hakim bicara tidak menyatakan secara khusus bahagian (c) bawah s. 300 dalam alasan penghakimannya, keterangan yang dikemukakan telah membuktikan unsur-unsur s. 300(c). Pihak pendakwaan telah mendedahkan semasa perbicaraan bahawa pihak

pendakwaan bergantung pada subseksyen tersebut untuk membuktikan unsur-unsur pertuduhan terhadap responden dan responden diwakili peguam semasa perbicaraan. Oleh itu, isu salah laksana keadilan tidak timbul semata-mata kerana hakim perbicaraan tidak secara khusus menyatakan s. 300(c) dalam alasan penghakimannya.

(4) Peruwati telah pulang ke Indonesia dan enggan hadir ke Malaysia untuk memberi keterangan dalam perbicaraan. Walau apa pun, apa yang penting ialah sama ada keterangannya adalah material kepada kes itu. Berbalik kepada keterangan di hadapan mahkamah, Peruwati mengejutkan suaminya, SP6, pada hari malang itu, memaklumkan SP6 bahawa jirannya sedang bergaduh. Selepas itu, SP6 sendiri mendengar bunyi pukulan dan jeritan berterusan seorang wanita dari rumah bersebelahan, dan melihat responden keluar dari pintu utama dan pulang ke rumah tersebut. Jika Peruwati dipanggil untuk memberi keterangan, versinya hampir sama dengan keterangan SP6. Pihak pembelaan gagal menunjukkan bahawa keterangan Peruwati adalah material dan pihak pendakwaan telah menahan atau menindas keterangan material ini. Selanjutnya, kegagalan memanggil Peruwati sebagai saksi tidak mewujudkan sebarang jurang dalam kes pendakwaan. Oleh itu, ketidakpanggilan Peruwati tidak mewajarkan inferens bertentangan bawah s. 114(g) Akta Keterangan 1950 dibuat.

(5) Versi bahawa rumah itu telah dirompak dan si mati telah dipukul oleh perompak apabila si mati gagal memberi mereka barang kemas dan wang yang diminta, tidak disokong oleh keterangan dan sememangnya luar biasa. Bukti menunjukkan bahawa barang kemas itu masih berada pada mayat si mati ketika SP5 menjalankan bedah siasat dan tiada barang berharga lain diambil daripada rumah itu. Bilik di dalam rumah itu tidak digeledah. Juga tiada bukti terdapat sebarang kecederaan pada badan responden jika dibandingkan dengan si mati yang mengalami kecederaan berganda dan membawa maut, walaupun responden memberi keterangan bahawa mereka berdua telah dipukul oleh perompak-perompak. Responden juga telah menangguh melaporkan kejadian itu kepada polis. Tiada sebab untuk SP6 mencipta atau mereka-reka keterangan terhadap responden kerana tiada permusuhan antara mereka. Juga tiada kesan DNA mana-mana orang lain yang ditemui di dalam rumah tersebut kecuali DNA responden dan si mati. Oleh itu, tiada penghargaan kehakiman yang tidak mencukupi terhadap keterangan oleh hakim bicara dalam mendapati pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Sehubungan itu, keputusan Mahkamah Rayuan diketepikan dan keputusan Mahkamah Tinggi mensabitkan responden di bawah s. 302 KK dikembalikan. Dia dijatuhi hukuman penjara 35 tahun dan 12 sebatan.

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Amri Ibrahim & Anor v. PP [2017] 1 CLJ 617 FC ***(refd)***
Chua Kian Voon v. Menteri Dalam Negeri Malaysia & Ors [2020] 1 CLJ 747 FC ***(refd)***
Dhivyaprabu Panir Selvam v. PP [2022] CLJU 1088; [2022] 1 LNS 1088 CA ***(refd)***
Fong Kong Meng & Anor v. PP [2019] 9 CLJ 301 ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***
Mickelson Gerald Wayne v. PP [2021] 10 CLJ 700 FC ***(refd)***
Mohamad Deraman v. PP [2011] 3 CLJ 601 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Ong Hooi Beng & Ors v. PP [2015] CLJU 63; [2015] 1 LNS 63 CA ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 CA ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
Pubalan Peremal v. PP [2020] 8 CLJ 306 FC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Yap Chai Chai & Anor v. PP [1973] CLJU 177; [1973] 1 LNS 177 FC ***(refd)***
Yap You Jee v. PP & Other Appeal [2015] 7 CLJ 897 CA ***(refd)***
Zulkiple Mohamad v. PP [2022] 1 CLJ 673 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180(1), (2), (3), (4), 182A
Evidence Act 1950, ss. 32(1)(i), 114(g)
Penal Code, ss. 300(a), (b), (c), (d), 302, 304(a), (b)
Rules of the Federal Court 1995, r. 137

For the appellant - Mohd Fairuz Johari; DPP
For the respondent - Charan Singh Kartar Singh & Noor Farihah Arshad; M/s Nurul, Charan & Shabnam

[Editor's note: Appeal from Court of Appeal; Criminal Appeal No: A-05(M)-493-10-2018 (overruled); Appeal from High Court, Ipoh; Criminal Trial No: 45B-9-10-2016 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nordin Hassan FCJ:

Introduction

[1] Sanderasegaran s/o Nithenanham ('the respondent') was charged with the murder of a woman, Durga Devi d/o Selvam ('the deceased') under s. 302 of the Penal Code. As specified in the charge, the alleged offence was committed between 11pm on 27 February 2016 and 6am on 28 February 2016 at house number 4, Kg Batu Besi, Ladang Sengat, Simpang Pulai, in the district of Ipoh, in the State of Perak Darul Redzuan.

[2] The respondent claimed trial at the Ipoh High Court and upon conclusion of the trial, he was found guilty and sentenced to death. On appeal to the Court of Appeal, his conviction under s. 302 of the Penal Code was substituted with a conviction under s. 304(a) of the same Code, and the respondent was sentenced to 20 years imprisonment from the date of arrest.

[3] Being aggrieved with the decision of the Court of Appeal, the Public Prosecutor ('the appellant') filed an appeal to this court against the said substitution of the conviction from an offence of murder under s. 302 to an offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code.

The Case For The Prosecution

[4] The prosecution relied on circumstantial evidence to establish its case and the relevant evidence adduced in the prosecution's narrative, was as follows.

[5] On 28 February 2016, at about 8am, Corporal Norhasimah binti Ibrahim (SP2) who was stationed at Simpang Pulai Police Station, received an emergency call informing that there was a robbery at a house, at the address mentioned in the charge. Based on this information, Lans Corporal Shafiq Azizi, and Corporal Jisham bin Jamu (SP3) proceeded to the house. On arrival at the said house, they entered the house, and SP3 saw two medical officers examining an Indian woman who was lying in the hall. SP3 was informed by one of the medical officers that the woman was already dead.

[6] In the house, SP3 also saw the respondent standing at the door of a room, and when asked by SP3 what had happened, the respondent replied that four Indian men had entered the house and had robbed and hit the deceased before fleeing from the house.

[7] The prosecution's main witness in this case was Saravanan s/o Maniam (SP6), who lived next door to the house where the incident happened. SP6 has lived there for 18 years and has known the respondent since they were young.

[8] SP6 testified that on 27 February 2016, at about 7pm, when SP6 and his wife, Peruwati binti Samiran, reached home from work, SP6 saw the respondent talking to a woman in front of his house. They then entered the house and SP6 went to sleep while his wife watched television. At about 1am, 28 February 2016, SP6's wife woke him up and informed him that she heard the sound of people fighting in the neighbour's house where the incident happened. At the same time, SP6 heard a loud hitting noise, followed by a woman's voice pleading not to be hit. SP6 also heard a male voice that he recognised as the respondent's. SP6 then peeked into the

neighbour's house and saw the respondent walking out through the main door and after looking to his left and right he went back in. After a while, SP6 heard hitting noises again from the said house and a woman's voice pleading not to be hit. SP6 also heard the respondent's voice saying 'mati ... mati' ('die ... die').

[9] Thereafter, SP6 went back to sleep and when he woke up at about 5.20am, he could still hear the hitting noise and at about 6.15am he heard a woman's voice breathing heavily and suspected she was dying. Next, at about 6.40am, when he was going to work, he saw the respondent in front of the house where the incident occurred.

[10] The deceased's body was sent to Hospital Raja Pemaisuri Bainun, Ipoh, Perak, and a post-mortem was conducted on 29 February 2016 at 9am by Dr Mohammad Shafie bin Othman (SP5) who identified the cause of death was head and soft tissue injuries due to blunt object trauma ('kecederaan kepala dan tisu lembut akibat trauma tumpul').

[11] The external injuries discovered by SP5 on the deceased as listed in the post-mortem report (P12) are as follows:

1. Kesan lebam dan bengkak meliputi kawasan atas kepala yang mengunjur ke muka sebelah kiri hingga cuping telinga kiri keseluruhannya merangkumi kawasan seluas 24 x 20 sm;
2. Lebam pada tepian kepala sebelah kanan berukuran 14 x 12 sm;
3. Dua luka koyak superfisial pada dan tepian batang hidung masing-masing berukuran 1 sm panjang;
4. Dua garis lecet 'tramline' melintangi pipi sebelah kiri masing-masing berukuran 10 x 1 sm dan 9 x 1 sm;
5. Lebam bibir atas berukuran 5 x 1.5 sm;
6. Kelompok lecet-lecet kecil pada pipi kanan berukuran di antara 1 x 1 sm hingga 3 x 2 sm;
7. Kesan lebam pudar pada tepian hadapan leher sebelah kanan berukuran 11 x 7 sm. Di hadapan leher kelihatan kelompok parut-parut kesan cakar kecil yang secara keselutuhannya merangkumi kawasan seluas 11 x 4 sm;
8. Lebam di bawah selangka kanan berukuran 3 x 3 sm;
9. Tiga kesan lebam 'tramline' di bahagian bawah abdomen setiapnya berukuran 5 x 1 sm;
10. Kesan lecet pada kawasan sempadan atas pinggul kiri merangkumi kawasan seluas 13 x 13 sm;
11. Kelompok lecet dan lebam 'tramline' di belakang badan merangkumi kawasan seluas 45 x 37 sm. Sekurang-kurangnya terdapat 37 kesan seumpama tersebut dalam kawasan ini dan ada di antaranya yang bertindih;

12. Kelompok lecet dan lebam 'tramline' di punggung kanan mengunjur hingga ke paha merangkumi kawasan seluas 46 x 23 sm. Sekurang-kurangnya terdapat 19 kesan seumpama tersebut dalam kawasan ini dan ada di antaranya yang bertindih;

13. Kelompok lebam sepanjang tepian luar lengan kanan merangkumi kawasan seluas 60 x 14 sm. Di dalam kawasan lebam ini juga kelihatan sekurang-kurangnya 9 kesan lebam/lecet 'tramline';

14. Lebam di belakang tangan kanan berukuran 14 x 12 sm.

15. Kelompok sekurang-kurangnya 7 lecet 'tramline' disertai dengan lebam pada kawasan tepian bahu kiri merangkumi kawasan seluas 13 x 10 sm;

16. Kesan lebam sepanjang lengan kiri hingga ke belakang serta belakang tangan kiri keseluruhannya merangkumi kawasan seluas 57 x 15 sm. Di dalam kawasan lebam ini juga kelihatan sekurang-kurangnya 6 kesan lebam/lecet 'tramline';

17. Kelompok sekurang-kurangnya 7 lebam-lebam 'tramline' di hadapan paha kanan merangkumi kawasan seluas 32 x 10 sm;

18. Kelompok sekurang-kurangnya 12 lebam-lebam 'tramline' di hadapan sehingga ke tepian luar paha kiri merangkumi kawasan seluas 26 x 17 sm;

19. Kesan lecet di luar pinggul sebelah kanan berukuran 10 x 8 sm.

20. Kelompok 6 kesan lebam 'tramline' pada tepian luar paha kanan merangkumi kawasan seluas 31 x 12 sm;

21. Kesan 4 lebam 'tramline' pada tepian luar betis kiri merangkumi kawasan seluas 31 x 12 sm;

22. Lebam pada tepian luar lutut kiri berukuran 18 x 10 sm;

23. Kelompok sekurang-kurangnya 5 kesan lebam 'tramline' pada tepian luar betis kiri merangkumi kawasan seluas 16 x 11 sm.

[12] Further, the internal injuries found by SP5 in the post-mortem on the head are as follows:

Kepala

Terdapat luka-luka koyak di bawah kulit kepala sehingga membentuk ruang/poket yang dipenuhi darah cair dan beku, dianggarkan sebanyak 800 ml. Kedua-dua otot pelipis kepala lebam. Tengkorak tidak retak. Selaput otak utuh. Otak menunjukkan sedikit pendarahan subdural. Lebam kecil dilihat pada otak di bahagian atas sebelah kanan. Tiada pendarahan atau lesi di dalam otak. Otak kecil tiada kejanggalan. Tulang muka menunjukkan kepatahan tulang batang hidung serta sekitar gigi di rahang atas.

[13] Having analysed the injuries and the post-mortem results, SP5 concluded that the injuries were caused by a hard and blunt object being repeatedly hit on the deceased. The repeated blows on the head caused excessive bleeding under the head skin and soft tissue. This caused the deceased's death. In the post-mortem report, SP5 concluded as follows:

> **Ringkasan Dan Kesimpulan**
>
> Pemeriksaan bedahsiasat mendapati tubuh badannya terutamanya kepala, muka belakang hingga punggung, kedua-dua lengan serta paha dipenuhi dengan kesan-kesan lecet dan lebam. Tanda-tanda kecederaan lebam pada tubuh simati adalah terdiri dari pelbagai corak. Banyak di antara kesan kecederaan tersebut terdiri dari kesan garis berkembar (tramlines).
>
> Antara objek yang sesuai digunakan untuk mendatangkan kecederaan-kecederaan pada tubuh simati adalah seperti i) suatu object yang keras/ pejal dan panjang seperti rod, dan ii) apa-apa objek yang keras dan tumpul seperti batu, kayu, dan besi. Tumbukan tangan dan tendangan kaki juga tergolong dalam kategori objek tumpul ini.
>
> Simati telah mengalami hentakan trauma tumpul seperti yang tersebut di atas secara bertubi-tubi sehingga menyebabkan pendarahan berlebihan di bawah kulit (kepala dan tisu lembut tubuh) yang akhirnya membawa kepada kematian.
>
> Tidak terdapat sebarang tanda penyakit biasa ditemui yang boleh menyebabkan atau menyumbangkan kepada kematiannya pada masa itu.
>
> Berdasarkan keadaan mayat, saya menganggarkan kematian telah berlaku dalam tempoh 24 jam dari waktu mayat diterima di Jabatan Forensik, Hospital Raja Permaisuri Bainun Ipoh (28 Februari 2016 @ 11.30am).

[14] The prosecution also presented forensic evidence to support its case. The DNA analysis of the exhibits collected from the house and swabbing of blood stains therein by the Chemist Nor Aidora binti Saedon (SP11) was found to contain the DNA of the respondent and the deceased only and no one else.

[15] Apart from this, the deceased's sister, Gowri d/o Selvam (SP7) testified that the respondent was the deceased's boyfriend who stayed together with the deceased in the said house for almost three months before the fateful day. SP7 further said that the respondent and the deceased always quarrelled and she had seen the respondent hit the deceased before and had reported the matter to the police. SP7's evidence was corroborated by the deceased's mother, Angelai Devi d/o Ganesan (SP10).

At The High Court

[16] Having considered the evidence presented by the prosecution at the close of the prosecution case on a maximum evaluation, the trial judge found that the prosecution had established a *prima facie* case of murder under s. 302

against the respondent. It was the findings of the trial judge that all the elements of the offence of murder had been proved. The trial judge found that SP6 was a credible witness and the cumulative circumstantial evidence had established a *prima facie* case. Hence, the respondent was called to enter his defence.

[17] It is relevant to mention here that the prosecution had attempted to tender the written statement of Peruwati binti Samiran under s. 112 of the Criminal Procedure Code as she had gone back to Indonesia and had refused to give evidence in court. The application was made under s. 32(1)(i) of the Evidence Act 1950. However, the application was dismissed by the trial judge.

[18] Next, having analysed the evidence by the defence, mainly that the deceased was hit by the robbers who had entered the house, the trial judge found that the defence was untenable and had failed to raise a reasonable doubt on the prosecution case. Hence, the respondent was convicted for the offence of murder and sentenced to death.

At The Court Of Appeal

[19] The respondent who was aggrieved with the trial judge's decision had appealed to the Court of Appeal. After hearing submissions by the parties and upon perusing the relevant evidence, the Court of Appeal among other things, agreed with the trial judge that SP6 was a credible witness. It was also the decision of the Court of Appeal that the evidence of SP6, together with other circumstantial evidence was sufficient to establish the respondent's guilt. Further, the non-calling of Peruwati as a witness in this case did not attract the invocation of adverse inference under s. 114(g) of the Evidence Act 1950.

[20] However, the Court of Appeal believed that the trial judge's failure to specify the relevant limb under s. 300 of the Penal Code, to which the respondent was found guilty, resulted in a miscarriage of justice for the respondent. Thus, the offence of murder under s. 302 of the Penal Code was substituted with the offence of culpable homicide not amounting to murder under s. 304(a) of the same Code and the respondent was sentenced to 20 years imprisonment.

[21] In the grounds of the judgment of the Court of Appeal, the basis for the substitution of the conviction can be found at paras. 27 and 28, which are as follows:

> [27] Kami telah memeriksa dan hujahan (*sic*) oleh peguam bijaksana Perayu, kami mendapati terdapat kegagalan Hakim Bicara membuat dapatan di bawah limb mana di bawah s. 300 Perayu didapati bersalah. Kami berpendapat bahawa kegagalan tersebut menyebabkan berlakunya kesalahan keadilan (miscarriage of justice) terhadap Perayu (rujuk kes *Fong Kong Meng & Anor v. PP* [2019] 9 CLJ 301)

A [28] Dengan terdapatnya kesalahan keadilan tersebut, kami sebulat suara memutuskan bahawa pihak pendakwaan telah gagal membuktikan pertuduhan di bawah s. 302 KK dan berdasarkan keseluruhan keterangan yang dikemukakan, kami memutuskan bahawa terdapat cukup keterangan untuk mensabitkan Perayu di bawah s. 304(a) KK. Setelah mendengar hujahan mitigasi Perayu, kami menjatuhkan hukuman penjara selama 20
B tahun dari tarikh tangkap.

The Appeal

[22] Before us, both parties submitted three issues for consideration by this court and they are as follows:

C (i) whether no specific or express finding by the trial judge under which limb of s. 300 of the Penal Code that the respondent was found guilty affects the prosecution's case in proving the offence of murder under s. 302 of the same Code;

D (ii) whether the non-calling of Peruwati binti Samiran, the wife of SP6, attracts the invocation of adverse inference under s. 114(g) of the Evidence Act 1950;

(iii) whether the defence has raised a reasonable doubt on the prosecution case.

E *Whether No Specific Or Express Finding By The Trial Judge Under Which Limb Of s. 300 Of The Penal Code That The Respondent Was Found Guilty Affects The Prosecution's Case In Proving The Offence Of Murder Under s. 302 Of The Same Code*

F **[23]** On this issue, the prosecution submitted that the trial judge did indicate in his grounds of judgment that the finding of guilt was based on limb (c) of s. 300 of the Penal Code although the said limb was not specifically mentioned. The evidence presented by the prosecution before the court had proved limb (c) of s. 300.

G **[24]** It was further submitted that the failure of the trial judge to state specifically limb (c) of s. 300, in finding the guilt of the respondent, does not affect the prosecution case as s. 300(a) to (d) only classified or explained the proof of intention or knowledge needed for a conviction for the offence of murder under s. 302 of the Penal Code.

H **[25]** On the other hand, the counsel for the respondent ventilated to us that the failure of the trial judge to state specifically under which limb of s. 300 had been proved by the prosecution had caused a miscarriage of justice for the respondent. This is pertinent for the defence to adduce the appropriate evidence to raise reasonable doubt on the prosecution case. The Court of
I Appeal case of *Dhivyaprabu Panir Selvam v. PP* [2022] CLJU 1088; [2022] 1 LNS 1088 was relied upon to support the contention.

[26] In deciding this issue, it is apposite to refer to the requirement of the law under the Criminal Procedure Code (CPC) concerning the duty of a trial judge at the end of the prosecution case and at the end of the trial. Section 180 of the CPC states:

Procedure after conclusion of case for prosecution

180(1) When the case for the prosecution is concluded, the Court shall consider *whether the prosecution has made out a prima facie case against the accused.*

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, *a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.* (emphasis added)

[27] The provision of s. 180 of the CPC is plain and unambiguous that at the end of the prosecution case, the duty of the trial judge is to determine whether the prosecution has made out a *prima facie* case as required under sub-s. 180(1). If the prosecution fails to do so, an order of acquittal shall be made according to sub-s. 180(2) and if a *prima facie* case has been established, the accused shall be called to enter his defence under sub-s. 180(3). Sub-section 180(4) then explained that a *prima facie* case is made out if the prosecution has adduced credible evidence proving each element of the offence.

[28] Next, at the end of the defence case, the trial judge has to determine whether the defence has raised any reasonable doubt on the prosecution case. If so, the accused is to be acquitted and if not, the trial judge is to convict and sentence the accused on the charge preferred against him. This is provided under s. 182A of the CPC which states:

Procedure at the conclusion of the trial

182A(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[29] There is nothing under ss. 180, 182A or other related provisions of the CPC that requires the trial judge to state specifically which limb of s. 300 of the Penal Code that the prosecution has proved, in particular before calling the accused to enter his defence. Further, the trial judge is also not required to give any reason for calling the accused to enter his defence. Any decision of the court that requires as such, would add something that is not required under the law or put words in a plain and unambiguous provision of the law. The court's duty is to interpret law passed by the Parliament but not to interpret the subjective intention of the Parliament.

[30] This court in *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273 Suffian LP said this:

> Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd. v. Sirs* seems to me to be particularly apt, for "*the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral* or to the words of Lord Scarman at p. 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as express in its enactment, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meetsthe legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it". (emphasis added)

[31] In *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561, this court at para. [30], had remarked:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, *the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute.* Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, *where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning.* The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. *It is not the*

> *province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed.* Even if the words in a statute may be ambiguous, the power and duty of the court "to travel outside them on a voyage of discovery are strictly limited." Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.
>
> (emphasis added)

(see also *Chua Kian Voon v. Menteri Dalam Negeri Malaysia & Ors* [2020] 1 CLJ 747; *Megat Najamuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385).

[32] On the same issue, this court in *Yap Chai Chai & Anor v. PP* [1973] CLJU 177; [1973] 1 LNS 177; [1973] 1 MLJ 219 explained at p. 221 as follows:

> Leaving aside for the moment the second appellant's statement, we are clearly of the opinion that the facts which were indisputable had established a clear *prima facie* case, and that the learned trial Judge would have been wrong to withdraw the case at that stage from the jury. *We do not think that the provisions of s. 204(2) of the Criminal Procedure Code (S.S.) had any application, nor do we agree with the contention of Datuk S.P. Seenivasagam that it was mandatory for the Judge at the close of the prosecution to enter on the record his opinion that there was a case to answer – the failure to do so rendering the trial a nullity.* As authority for this proposition, two cases were cited to us, being the judgments delivered by Willan CJ in *Ng Peng Choon v. Public Prosecutor* [1947] MLJ 87 and *Govindasamy v. Public Prosecutor* [1949] MLJ 101. In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. *What is always of paramount importance in the administration of criminal justice is a fair trial – not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual.* (emphasis added)

[33] The principle in *Yap Chai Chai*'s case was endorsed by the Supreme Court in *Junaidi Abdullah v. PP* [1993] 4 CLJ 201 where Mohamed Azmi SCJ stated:

A In our opinion, *there is also no statutory provision requiring a Judge sitting alone to expressly record his reason before calling the Accused to enter his defence or to state his findings on the credibility of main prosecution witnesses.* But, as a matter of practice, where there is a particular reason for doing so, such as where a submission of no case to answer has been made in a complex case, or where the Accused is called to enter a defence on a lesser or alternative
B charge, Judges do sometimes give their reasons. In uncomplicated cases, such as in the instant appeal, it is not obligatory or even necessary to do so. *By calling an Accused to enter his defence, it should be assumed that the trial Judge must on evaluation of the evidence, have been satisfied that the prosecution has, at that stage of the trial, established a prima facie case,* which if unrebutted
C would warrant a conviction of the Accused. *To arrive at such a conclusion, it is inherent that the Judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis.* In this appeal the establishment of a *prima facie* case of unlawful possession of fire-arm under s. 57 of Internal Security Act was so obvious even to the defence Counsel that it became academic and unnecessary for the Court to
D consider an order of acquittal under s. 180 of the Criminal Procedure Code. *Thus, when the learned Judge called for the defence in the present case, he must have been satisfied that there was a prima facie case to answer, which if unrebutted would warrant a conviction, and it was not mandatory for him to record the reasons for his satisfaction,* even if there had been no concession made by the defence Counsel. However, whether the Judge was actually correct
E in law in calling for the defence was of course open for review on appeal to this Court. Be that as it may, *we hold the view that mere failure or omission on the part of a trial Judge to record his grounds for calling for the defence or to record his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss. 60 and 72 of the Courts of Judicature Act read together with s. 167*
F *of Evidence Act and s. 422 of the Criminal Procedure Code.* (emphasis added)

[34] Hence, based on the statutory provisions and authorities cited above, what is pertinent for the trial judge at the end of the prosecution case is to determine whether the prosecution has established a *prima facie* case and a *prima facie* case is established if all elements of the charge have been proved
G by credible evidence. Next, if the defence is called, the trial judge has to decide whether the defence has raised a reasonable doubt on the prosecution case. At the risk of repetition, the trial judge is not required to give any reason for calling the accused to enter his defence and in the context of the present case, to state specifically that the prosecution has proved one of the
H limbs of s. 300 of the Penal Code although it is a good practice to do so to make it clear in the grounds of judgment the particular limb of the section that the trial judge found has been proved by the prosecution.

[35] This view would also cater to a situation where no grounds of judgment were furnished by the trial judge. As such, no reasons were
I available for calling the defence or for the conviction if any. Here, it is settled law that the non-availability of grounds of judgment does not render the

conviction a nullity. In this regard, I agree with the decision of the Court of Appeal in *Yap You Jee v. PP & Other Appeal* [2015] 7 CLJ 897 where Tengku Maimun Tuan Mat JCA (now the Chief Justice) said this:

> [34] *There is no statutory provision requiring a trial judge to prepare grounds of judgment in finding a prima facie case and in calling for the defence* (see *Junaidi Abdullah v. Public Prosecutor* [1993] 4 CLJ 201; [1993] 3 MLJ 217; *Abdul Hamid Udin v. PP* [2000] 1 LNS 198; [2006] 6 MLJ 334). The issue of absence of grounds of judgment for the decision at the close of the case of the prosecution would not have arisen in this appeal but for the fact that different Sessions Judges heard the case for the prosecution and the defence. And much has been made out of the fact that the previous Sessions Judge had promised to give a written ground for the *prima facie* case.
>
> [35] We noted Mr Gobind's submission on the point of fair trial and that he was not able to stand up and submit or challenge the findings or reasons for the *prima facie* case. *In our view, the absence of the grounds of the judgment has not prejudiced the appellants. To our mind, what is more important at the close of the case for the prosecution is for the accused to know what is it that he has to answer in his defence. It is not the case here that the appellants were prejudiced for not being able to put up his defence properly. We similarly find this ground of appeal without merits.* (emphasis added)

[36] It is also settled law that an appeal is a re-hearing where the appellate court may review or re-evaluate all the evidence even if there is a lack of specific findings by the trial judge. Thus, even if in the present case, the trial judge did not make a specific finding on the limb (c) of s. 300 before calling the accused to enter his defence, it does not prevent the Court of Appeal from sieving through the evidence and determine whether the particular limb has been proved. What is important is whether, on the evidence presented, the prosecution has proved all required elements of the offence. This includes the proof of limb (c) of s. 300 in the present case for the offence of murder.

[37] This court in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800 opined:

> [20] As regards the first main ground of appeal raised by the appellant, *I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings.* In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial Court are correct. (See *Mohamed Mokhtar v. PP* [1972] 1 MLJ 122). In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had

implicated the appellant. *There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the Court of Appeal did not err on this issue.* (emphasis added)

(see also *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579; *Mohamad Deraman v. PP* [2011] 3 CLJ 601).

[38] Reverting to the present case, it is settled law that for the prosecution to establish an offence of murder punishable under s. 302 of the Penal Code, the elements to be proved by the prosecution are, the death of the deceased, the deceased died as a result of the injuries suffered, the injuries were caused by the accused, and the accused's act comes within one or a combination of the limbs under s. 300 of the Penal Code. The act under any one or combination of the limbs under s. 300 establishes the offence of murder.

[39] Next, the following facts must be proved by the prosecution to bring a case under s. 300(c), which are, the presence of bodily injury, the accused inflicted the injury voluntarily, not by accident or unintentionally and the injury is sufficient in the ordinary course of nature to cause death.

[40] In the present case, the prosecution, from the beginning of the trial, had made it clear that the prosecution was relying on limb (c) of s. 300, as stated in its opening speech (P3), at para. 4, in the following words:

> 4. Pihak pendakwaan akan membuktikan bahawa perbuatan atau tindakan tertuduh adalah dengan niat untuk mendatangkan kecederaan ke atas simati dan kecederaan tersebut adalah cukup pada lazimnya untuk menyebabkan kematian (seksyen 300(c) Kanun Keseksaan).

[41] The prosecution's stand in relying on limb (c) of s. 300 was reiterated in its written submission at the end of the prosecution case at paras. 24(iii), 29, 30, and 36 which state:

Paragraph 24(iii)

> (iii) Pihak pendakwaan bergantung kepada **cabang (c) s. 300KK** iaitu kecederaan tersebut telah dilakukan dengan sengaja oleh tertuduh dengan niat untuk menyebabkan kecederaan pada tubuh badan simati.

Paragraphs 29 and 30

> 29. Daripada **peruntukan s. 300(c) Kanun Keseksaan,** jelas bahawa kesalahan bunuh boleh dilakukan apabila tertuduh secara sengaja menyebabkan kecederaan, yang mana dalam keadaan biasa (in ordinary course of nature) perbuatan tersebut adalah memadai untuk menyebabkan kecederaan dan membawa maut. Kecederaan pada kepala sudah boleh membawa maut.

30. Di bawah **limb (c) s. 300** ini niat membunuh bukan pra syarat yang pendakwaan perlu buktikan.

Paragraph 36

36. Keterangan SP5 dan SP6 sudah dapat membuktikan **s. 300(c) tersebut.** (emphasis added)

[42] In coming to its findings that the prosecution had established a *prima facie* case for an offence under s. 302 of the Penal Code, the trial judge did address his mind to all the elements to be proved by the prosecution which can be seen at para. 9, of the grounds of judgment. Thereafter, having considered all the evidence on a maximum evaluation, the trial judge found that a *prima facie* case had been established and called the accused to enter his defence. At para. 37, of the said grounds of judgment, the trial judge said this:

> [37] Berdasarkan penelitian dan pertimbangan secara maksimum ke atas keseluruhan keterangan 9 saksi yang dipanggil PP adalah didapati bahawa PP telah berjaya membuktikan satu kes *prima facie* terhadap OKT sebagai mana tuduhan. Dengan kata lain, *PP telah membuktikan bahawa OKT dengan sengaja memukul dan mendatangkan bencana tubuh ke atas si mati. Bencana tubuh yang di maksud hendak dikenakan tersebut adalah cukup pada lazimnya menyebabkan kematian si mati* atau OKT tahu perbuatannya itu adalah begitu berbahaya hingga berkemungkinan besar menyebabkan kematian atau menyebabkan sesuatu bencana tubuh yang boleh membawa kepada kematian si mati. Keterangan kes PP adalah cukup kuat sehinggakan sekiranya OKT memilih untuk berdiam semasa pembelaan dipanggil, ianya adalah memadai untuk mahkamah mendapati OKT bersalah seperti mana tuduhan. Dengan itu, OKT di panggil membela diri. (emphasis added)

[43] The above para. 37 of the grounds of judgment clearly shows that the evidence presented by the prosecution had established the element that the respondent had voluntarily caused the injuries which in the ordinary course of nature would cause death. This is the element specified under s. 300(c) of the Penal Code as submitted by the prosecution in their submission at the end of the prosecution case. No prejudice was thus occasioned by the absence of the express specification of limb (c) to s. 300, using the words in *Yap You Jee*, para. [35].

[44] As mentioned earlier, even if the trial judge did not state specifically of limb (c) of s. 300 or in the worst case scenario, where there were no grounds of judgment by the trial judge, the appellate court is duty bound to sieve through the evidence presented and determine whether a *prima facie* case has been proved at the end of the prosecution case and if the defence was called, whether the defence has raised any reasonable doubt at the end of the case. It is pertinent to note that a criminal case is proved or otherwise

by evidence of witnesses and documents tendered in court, not by what is submitted by parties or anything said or omitted to be said by the trial judge in his grounds of judgment. Otherwise, it would go against the principles of criminal justice and fair trial.

[45] In the present case, the crucial issue here is whether the evidence before the court had proved a *prima facie* case for the offence of murder under s. 302 of the Penal Code. The issue of contention here is whether the element under s. 300(c) had been proved by the prosecution. As such, all the relevant evidence adduced needs to be analysed to determine this issue, which unfortunately, the Court of Appeal failed to do so.

[46] As alluded to earlier, the pathologist, SP5, found multiple injuries on the deceased body, and the fatal blow which had caused her death was on the head. It is instructive to reproduce the relevant part of SP5's post-mortem report as follows:

> Antara objek yang sesuai digunakan untuk mendatangkan kecederaan-kecederaan pada tubuh simati adalah seperti i) suatu object yang keras/ pejal dan panjang seperti rod, dan ii) apa-apa objek yang keras dan tumpul seperti batu, kayu, dan besi. Tumbukan tangan dan tendangan kaki juga tergolong dalam kategori objek tumpul ini.
>
> *Simati telah mengalami hentakan trauma tumpul seperti yang tersebut di atas secara bertubi-tubi sehingga menyebabkan pendarahan berlebihan di bawah kulit (kepala dan tisu lembut tubuh) yang akhirnya membawa kepada kematian.*
>
> Tidak terdapat sebarang tanda penyakit biasa ditemui yang boleh menyebabkan atau menyumbangkan kepada kematiannya pada masa itu.
>
> Berdasarkan keadaan mayat, *saya menganggarkan kematian telah berlaku dalam tempoh 24 jam dari waktu mayat diterima di Jabatan Forensik, Hospital Raja Permaisuri Bainun Ipoh (28 Februari 2016 @ 11.30am).* (emphasis added)

[47] The head injuries which were caused by continuous hitting with blunt objects had caused the deceased's death. Based on the evidence of SP5, the evidence of SP6 who heard the continuous hitting as well as the voice of a woman screaming, and evidence that showed the deceased was already dead when SP3 and SP2 went to the house as described earlier, it is justified for the trial judge in his finding that the respondent had caused the injuries voluntarily and the injuries on the head are sufficient in the ordinary cause of nature to cause death. Even if the trial judge had not specifically stated limb (c) of s. 300 in his grounds of judgment, the evidence presented in the present case, had proved the element of s. 300(c).

[48] In other words, what is important is the evidence proving the injuries inflicted voluntarily by the respondent in the ordinary course of nature had caused death to the deceased. This requires the trial judge to make an objective assessment of the evidence, especially the medical or forensic

evidence, see *Mickelson Gerald Wayne v. PP* [2021] 10 CLJ 700; [2022] 6 MLJ 118, para. [59]. Even if in the evidence, either orally or in writing, there is no mention of the phrase that the injuries "in the ordinary course of nature to cause death", it does not mean that the prosecution failed to prove the element of s. 300(c). The cumulative evidence, especially from the pathologist who conducted the post-mortem on the deceased needs to be analysed to determine whether the injuries inflicted in the ordinary course of nature caused death. See *Pubalan Peremal v. PP* [2020] 8 CLJ 306; [2020] 5 MLJ 442. In the present case, as alluded to earlier, the element of s. 300(c) has been proved by the prosecution.

[49] This court had the occasion to deal with this matter in *Zulkiple Mohamad v. PP* [2022] 1 CLJ 673 where Abdul Rahman Sebli FCJ (as he then was), stated as follows:

> [15] Whether the injury is sufficient in the ordinary course of nature to cause death is essentially a question of fact for the court to determine. Since however, this is a matter that is in the realm of medical science, medical evidence is needed to assist the court in arriving at a decision. Obviously, it is not for any layperson without the proper medical training and background to determine as a matter of scientific fact whether a particular injury is sufficient in the ordinary course of nature to cause death.
>
> …
>
> [20] *The crucial part of SP13's evidence was that the injuries on the deceased's head could cause direct or almost immediate fatality, ie, death* ("Kecederaan-kecederaan tersebut boleh secara terus atau sehampir secepat menyebabkan kematian"). He testified that the deceased would not be able to survive the injuries.
>
> [21] *This effectively means that the injuries were of a kind that is "sufficient in the ordinary course of nature to cause death" within the meaning of cl. (c) of s. 300 of the Penal Code although SP13 did not describe the injuries in those exact terms either in his post-mortem examination report or in his oral evidence in court.* At the trial, SP13 was shown the baseball bat (P10A) that the police seized from the scene of crime and he confirmed that it could cause injuries 1, 2, and 3 found on the deceased's head. (emphasis added)

[50] The element of s. 300(c) of the Penal Code in this case has been proved based on evidence before the court. The prosecution had disclosed during the trial that the prosecution was relying on the said subsection to prove the elements of the charge against the respondent. Further, the respondent was represented by counsel during the trial. Hence, the issue of miscarriage of justice does not arise in the present case simply because the trial judge did not specifically state s. 300(c) in his grounds of judgment.

[51] In determining the issue of miscarriage of justice, the test laid down in *PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843 is also instructive where this was stated:

A ... In our view, having regard to the aforesaid object of the CPC, *the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answers to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion*
B *is that there has been no prejudice and failure of justice.* If the answers are in the negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused. But, none of the learned High Court Judges in these appeals did really consider whether or not the misdirection had occasioned a failure of justice. They simply struck it down as an illegality
C for the aforesaid reasons. With due respect, we are of the opinion that such approach is not in consonance not only with the modern trend but also not in keeping along with certain well-established and well understood lines that accord with our notion of natural justice that can be discerned from the Indian experience.

D ...

Whatever it is what remains to be considered is whether there is sufficient evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice.

(emphasis added)

E **[52]** In the present case, the respondent was given a fair trial, knew what he was being tried for, and was given a full and fair chance to defend himself especially since he was represented by counsel. Most importantly, there was sufficient evidence to support his conviction. After all, the respondent's defence is a mere denial of committing the murder. In his defence, he
F testified that the murder was committed by robbers who entered the house. This defence was not affected by the failure of the trial judge to specifically state the limb of s. 300 of the Penal Code. Therefore, I find, there was no miscarriage of justice.

G **[53]** This court in the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 had also held that the failure to state specifically or make a finding that the prosecution had proven its case beyond reasonable doubt, had not occasioned a miscarriage of justice. In that case, the court opined:

H [11] In our respectful view, Arulpragasan is the authority for the proposition that the test to be applied under the former ss. 173(f) and 180 of the CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused could be called upon to enter his defence. *It is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. The failure by the trial court*
I *either to make or to record such a finding does not in our judgment occasion a miscarriage of justice ...* (emphasis added)

[54] The Court of Appeal in the present case ruled that the failure of the trial judge to state specifically s. 300(c) established the respondent's guilt had occasioned a miscarriage of justice. Reliance was placed on this court's decision in *Fong Kong Meng & Anor v. PP* [2019] 9 CLJ 301. However, having read the case, I find that the reliance on this case to support the proposition that the failure by the trial judge to state the specific limb of s. 300 had occasioned a miscarriage of justice is misplaced. Nothing in *Fong*'s case, expressly states or indicates such a legal principle. In that case, it was a review under r. 137 of the Rules of the Federal Court 1995. The applicants were convicted under s. 302 by the High Court and sentenced to death. The High Court found that the prosecution had proved the element under s. 300(d) of the Penal Code, one of the elements to prove the offence of murder under s. 302. The decision was upheld by the Court of Appeal. However, the Federal Court found that the element under s. 300(d) had not been proved and reduced the conviction to culpable homicide under s. 304(a). Aggrieved with the decision, the applicants filed a review application as they contended that the conviction should be reduced to an offence under s. 304(b).

[55] In dismissing the review application on the ground that there was no error by the earlier panel, the court also remarked that there was no miscarriage of justice as the applicants had the benefit of three court hearings and legal representations. David Wong Dak Wah CJSS (as he was then) said this:

> [27] The applicants had been sentenced to 20 years' imprisonment instead of a death sentence. Taking into consideration of the cruel treatment by one human being to another which eventually led to an untimely and tragic death of the latter, any reasonable tribunal would find the aforesaid imposed sentence to be appropriate as it reflected squarely on the seriousness of the offence. **Both applicants had the benefit of three court hearings and legal representations hence one cannot say in fairness that there has been a miscarriage of justice.**
>
> [28] **In sum, there was no error on the part of the earlier panel.** Rather, the error lies on the part of the applicants who saw the nexus as between s. 304 Code and s. 300 Code, when in fact, the true nexus only exists between s. 304 Code and s. 299 Code. The language employed by the drafters in s. 299 Code cannot be clearer in terms of stipulating which offence it has been legislated to provide punishments for. To our minds, as alluded to in the preceding paragraphs above, s. 304 Code has nothing to do with s. 300 Code. It has everything to do with s. 299 Code.
>
> (emphasis added)

[56] In the circumstances, it is pertinent to reiterate here that the failure of a trial judge to state specifically which limb of s. 300 of the Penal Code in coming to its decision at the end of the prosecution case or the end of the case, does not affect the prosecution case or cause a miscarriage of justice to the accused. The paramount importance is the evidence before the court for

its determination. The Court of Appeal case of *Dhivyaprabu Panir Selvam v. PP* [2022] CLJU 1088; [2022] 1 LNS 1088 on this aspect and relied upon by the Court of Appeal, is no longer a good law.

[57] On this ground alone, I find there is merit in the appellant's appeal as this issue was the sole basis in the Court of Appeal's decision to substitute the conviction of murder to culpable homicide not amounting to murder. In any event, for the sake of completeness, I now move to other issues raised by the parties in the appeal.

Whether The Non-calling Of Peruwati binti Samiran, The Wife Of SP6, Attracts The Invocation Of Adverse Inference Under s. 114(g) Of The Evidence Act 1950

[58] As regards this issue, counsel for the respondent submitted that the failure to produce Peruwati as a witness or to be offered to the defence had raised an adverse inference against the prosecution under s. 114(g) of the Evidence Act 1950 which provides:

> **Section 114. Court may presume existence of certain fact**
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> **The court may presume:**
>
> **... (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.**
>
> (emphasis added)

[59] It is settled law that the invocation of this provision is at the discretion of the court under the circumstances of the case. It can be drawn if there is withholding or suppression of material witnesses or documents. It is also applicable if the non-calling of the material witness or the production of the material document has created a gap in the prosecution case.

(See *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; *Amri Ibrahim & Anor v. PP* [2017] 1 CLJ 617; *Ong Hooi Beng & Ors v. PP* [2015] CLJU 63; [2015] 1 LNS 63; [2015] 3 MLJ 812).

[60] In the present case, the established facts were that Peruwati had gone back to Indonesia and refused to return to Malaysia to testify in the trial. The prosecution's attempt to tender her written statement under s. 32(1)(i) of the Evidence Act 1950 was rejected by the trial judge. Be that as it may, what is important is whether her evidence is material to the case, whether there was withholding or suppression of her evidence and without her evidence, it has caused a gap in the prosecution case.

[61] Reverting to the evidence before the court, Peruwati woke up her husband, SP6 at about 1am, 28 February 2016 informing SP6 that their neighbour was quarrelling. Thereafter, SP6 himself heard the continuous hitting and screaming voice of a woman from the neighbour's house. He also saw the respondent exit the main door and return to the house. Even if Peruwati was called to testify, her version would be almost the same as SP6's evidence. The defence here had failed to show that Peruwati's evidence was material and the prosecution had withheld or suppressed this material evidence. Further, the non-production of her as a witness did not create any gap in the prosecution case. As such, I agree with the findings of the trial judge and affirmed by the Court of Appeal that the non-calling of Peruwati did not warrant an adverse inference under s. 114(g) of the Evidence Act 1950 to be drawn.

Whether The Defence Has Raised A Reasonable Doubt On The Prosecution Case

[62] As mentioned earlier, in essence, the respondent's defence was that the murder was committed by robbers who entered the house, and the respondent was not involved in the said murder. The defence was laid down in the respondent's witness statement (D51) and in his oral testimony which was considered by the trial judge as can be seen from paras. 38 to 58 of the grounds of judgment.

[63] Having considered the defence and all available evidence, the trial judge found that the defence had failed to raise a reasonable doubt on the prosecution case. This finding was based among others, on the following reasons:

(i) the version that the house was robbed and the deceased was hit by the robbers when the deceased failed to give them the jewellery and money demanded by them was not supported by evidence and is inherently incredible. The evidence shows that the jewellery was still on the deceased body when SP5 conducted the post-mortem and no other valuable items were taken from the house including a handphone that was being charged in the room. The room in the house was not even ransacked. Next, there was no reason for the robbers to be in the house for a long period, according to the defence from 2.30 to 6am, and continuously hitting the deceased;

(ii) the respondent testified that the deceased and him were hit by the robbers but there was no evidence of any injury on the respondent's body when compared with the deceased who suffered multiple and fatal injuries;

(iii) the respondent's delay in reporting the incident to the police. The robbers were said to have left the house at about 6am but the matter was reported to the police at 8am, 28 February 2016;

A (iv) there was no reason for SP6 to invent or concoct the evidence against the respondent. No evidence was presented of any animosity between them for SP6 to implicate the respondent with the murder; and

(v) the existence of a motorcycle registration number AE 4695 which was left in front of the house does not assist the defence as no evidence was
B shown that the motorcycle was left by the robbers and investigation revealed that the motorcycle was registered under the name of Chan Kai Tong, age 73 years.

[64] There were also no traces of the DNA of any other persons found in
C the house except that of the respondent and the deceased.

[65] In this regard, I find, there is no insufficient judicial appreciation of evidence by the trial judge in finding that the defence had failed to raise a reasonable doubt on the prosecution case. The trial judge was also in a better position to assess the credibility of witnesses as he had the audio-video
D advantage over the witnesses and the appellate court should be slow in disturbing such findings unless there is cogent reason to do so which I find none in the present case.

Conclusion

[66] In the upshot, there is merit in this appeal and as such, the appeal is
E allowed, the decision of the Court of Appeal is set aside and the decision of the High Court in convicting the respondent under s. 302 of the Penal Code is restored. As regards to the sentence, having considered submissions by both parties, the application of the Abolition of Mandatory Death Penalty Act 2023 (Act 846), and the amended s. 302 (Act 574), the respondent is
F sentenced to 35 years of imprisonment from the date of arrest and 12 strokes of whipping. My learned brother Mohamad Zabidin Mohd Diah CJM, and my learned sister Mary Lim Thiam Suan FCJ have read the judgment in draft and have agreed to it.

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